

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: David E. BRACKEN 56145

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2523

David E. BRACKEN

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By an order dated 2 July 1990, an Administrative Law Judge of the United States Coast Guard at Tampa, Florida suspended Appellant's license and any documents issued for one month, remitted on three months probation, having found proved the charge of misconduct.

The specification supporting the charge of misconduct alleges that Appellant, while serving under the authority of the above-captioned license as master of the tug M/V BELCHER PORT EVERGLADES, O.N. 636207, did, on 8 January 1990, wrongfully fail to report as soon as possible the grounding of barge BELCHER 101 (which said tug was towing) as required in 46 C.F.R. +4.05-1(a).

The hearing was held at Tampa, Florida on 12 February and 30 March 1990. Appellant was not present at the initial session but was present at the subsequent session. Appellant was represented at both sessions by professional counsel. At the hearing, Appellant entered an answer of "deny" to the charge and specification.

The Investigating Officer introduced in evidence four exhibits. In defense, Appellant offered in evidence four exhibits and the testimony of three witnesses.

The Administrative Law Judge issued a decision in which he concluded that the charge and specification had been found proved. Subsequently, the Administrative Law Judge issued a written order on 2 July 1990, suspending Appellant's license for a period of one month remitted on three months probation. The Decision and Order was served on Appellant on 11 July 1990. Appellant filed his notice of appeal on 23 July 1990. Appellant perfected his appeal by filing a supporting brief on 5 October 1990 after receiving an approved filing extension. Accordingly, Appellant's appeal is considered timely and properly before the Vice Commandant for review.

FINDINGS OF FACT

On 8 January 1990, Appellant was serving as Master of the tug M/V BELCHER PORT EVERGLADES under the authority of his above-captioned license. Appellant's license authorized him to serve as Master of freight and towing vessels of not more than 1,000 gross tons upon oceans; also, Mate of uninspected motor vessels of any gross tons upon oceans; also radar observer - unlimited. Appellant's license was issued by the Coast Guard at Boston, Massachusetts, on 14 April 1986.

On 8 January 1990, the M/V BELCHER PORT EVERGLADES was pushing the barge BELCHER 101 loaded with petroleum product, inbound through Tampa Bay, enroute to Port Manatee, Florida. At approximately 1405 on 8 January 1990, the barge grounded on the Southeast corner of a right turn into Port Manatee Channel. There was no apparent damage to the barge. The barge was quickly refloated and, with the M/V BELCHER PORT EVERGLADES, entered Port Manatee without further incident.

After arriving in Port Manatee on the afternoon of 8 January 1990, Appellant notified his superior of the grounding. This superior

was located in the offices of Coastal Tug and Barge, Inc., Miami, Florida (Coastal). Subsequently, a senior vice-president of Coastal notified the Coast Guard Marine Safety Office (MSO) Tampa, Florida of the accident midday on 11 January 1990. On the morning of 12 January 1990, Appellant personally appeared before MSO Tampa's Senior Investigating Officer and fully advised him of the details of the grounding.

Appellant also submitted a completed Report of Marine Accident, Injury or Death Form (Form CG-2692). However, the Senior Investigating Officer advised Appellant to take more time in completing the form and re-submit it at a later date. Following that advice, Appellant supplemented the Form CG-2692 and submitted it to the Coast Guard within a few days.

Appearance: Steven J. Delaney, Attorney at Law, P.O. Box 025500, Miami, Florida 33012-5500.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant submits several bases of appeal, however, because of the disposition of this case, only the following basis need be discussed.

Appellant asserts that the notification of the marine casualty provided by Appellant was timely as a matter of law and regulation.

OPINION

Appellant asserts that his actions in notifying his company and the Coast Guard sufficiently met the notification requirements of law and regulation.

Upon a full review of the record, I agree.
The statute in issue, 46 U.S.C. +6101 states in pertinent part that:

(b) A marine casualty shall be reported within 5 days as provided in this part and regulations prescribed under this part . . .

Two regulations have been promulgated implementing this statute. The first of these, 46 C.F.R. +4.05-1 states in pertinent part:

The owner, agent, master or person in charge of a vessel involved in a marine casualty shall give notice as soon as possible to the nearest Coast Guard Marine Safety or Marine Inspection Office whenever the casualty involves any of the following:

(a) All accidental groundings and any intentional groundings . . (emphasis supplied)

The second of these regulations is 46 C.F.R. +4.05-10 which states in pertinent part that:

(a) In addition to the notice required by +4.05-1, the Marine employer shall, within five days, report in writing to the Officer in Charge, Marine Inspection at the port in which the casualty occurred or the nearest port of first arrival. The written report . . . shall be made on Form CG-2692 . . .

(b) If filed without delay, the Form CG-2692 May also provide the notice required by 4.05-1. (emphasis supplied)

The dispositive issue is whether, under the circumstances of this case, the filing of the Form CG-2692 within five days of the casualty constituted a filing "without delay" within the meaning of 46 C.F.R. +4.05-10(b). If it does, then it also serves to fulfill the notice

requirement of 46 C.F.R. §4.05-1.

As noted in Appeal Decision 2447 (HODNETT), the term "without delay" is not defined but it is discussed in Appeal Decision 2261 (SAVOIE).

46 C.F.R. 4.05-10(a) and (b) clearly contemplates that notice of a marine casualty may be effected by personal appearance of the person in charge or even in written form filed by mail. Since the regulations themselves allow less expeditious forms of notice to qualify as notice "without delay", the "as possible" requirement of 46 C.F.R. 4.05-1 takes on a new lustre. (emphasis supplied).

While neither of the aforementioned cases is dispositive of the present matter, (HODNETT, supra, was dismissed, in pertinent part, on the totality of several issues including the lack of identity of the person in charge; in SAVOIE, supra, the casualty was actually reported to the Coast Guard prior to the time that a written report could have been mailed) the principle of SAVOIE, supra, cited with approval in HODNETT, supra, does bear on the case herein.

In this case, Appellant filed Form CG-2692 with the Coast Guard three days and seventeen hours after the grounding [TR 40]. Absent any showing that there was a delay on the part of the Appellant in filing this form, such a filing within the five day time period amounts to a per se satisfaction of the notification requirements of the statute and of 46 C.F.R. §4.05-1.

A determination of what constitutes "without delay" is made by reviewing the pertinent facts reflected in the record. For example, the resources available to the respondent and/or intervening or extenuating factors such as weather, transportation availability, access to postal services, etc. are all considerations. It is significant in the instant case that the record is silent as to any of these detailed circumstances regarding Appellant's submission of the Form CG-2692. The record fails to demonstrate what resources were available to Appellant or that Appellant could have reasonably filed the form in a more expeditious manner. Accordingly, a characterization of the timing of the submission of the Form CG-2692 is not possible.

Based on the foregoing, it cannot be concluded that Appellant failed to meet the "without delay" filing requirement in 46 C.F.R. §4.05-10(b). Accordingly, it cannot be concluded that Appellant failed to meet the "as soon as possible" notice requirement of 46 C.F.R. §4.05-1. While not dispositive of this case, it should be noted that filing a Form CG-2692 after the five day period has elapsed would not be considered "without delay" regardless of the circumstances and therefore would fail to meet the notification requirements of the statute and of 46 C.F.R. §4.05-1.

CONCLUSION

The finding of proved to the charge and specification of misconduct law of the Administrative Law Judge is NOT supported by substantial evidence of a reliable and probative nature.

ORDER

The Decision of the Administrative Law Judge dated in Jacksonville, Florida on 2 July 1990, is VACATED, the findings are SET ASIDE and the charge and specification DISMISSED.

/s/

MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 7th day of May, 1991.

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DECISIONS ON APPEAL: 2447 (HODNETT); 2261 (SAVOIE).

CITATIONS: 46 USC 7702; 46 CFR 5.701; 46 CFR 4.05-1; 46 CFR 4.05-10.

CASES: NONE

***** END OF DECISION NO. 2523 *****